Supreme Court, U.S.
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No. 03 555 OCT 14 2003

In The

Supreme Court of the United States

ARTHUR MYERS,

Petitioner,

v.

CITY OF NORTH MIAMI and
INTEGRATED INS. CO.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Florida First District Court Of Appeal**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of the United States should exercise its jurisdiction to review a decision of a Florida District Court of Appeal declaring valid a state statute, which eliminated a workers' compensation benefit on account of the receipt of federal social security benefits, when:

Question One: (A) The Supreme Court of the United States has declared unconstitutional on supremacy grounds, a provision in a state workers' compensation law which reduced workers' compensation on account of the receipt of benefits under federal law, when there was no specific authorization by Congress to the states for such reduction. *Rose v. Arkansas State Police*, 479 U.S. 1, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986).

(B) The 1965 authorization by Congress to the states to reduce workers' compensation on account of the receipt of social security disability was withdrawn by Congress as of February 18, 1981. Pub. L. No. 97-35, sec. 2208(6) (1981); 42 U.S.C. § 424a(d) (1981).

(C) The Social Security Administration adopted 20 C.F.R. § 404.408(b), providing that state laws reducing workers' compensation on account of the receipt of social security actually had to have been in effect on February 18, 1981, and that the federal government would not recognize any change in state law after that date.

(D) This Florida statute was not enacted until 1990.

QUESTIONS PRESENTED FOR REVIEW – Continued

Question Two: The highest courts of three states have invalidated workers' compensation statutes which reduce permanent total disability benefits on account of the receipt of social security old age retirement, on equal protection grounds, although other states' highest courts take a contrary view.

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Harrell v. Florida Construction, et al., and *Arthur Myers v. City of North Miami, et al.*, 834 So. 2d 352 (Fla. 1st DCA 2003).

Harrell, et al. v. Florida Construction Specialists, et al., 851 So. 2d 728 (Fla. 2003).

CONCISE STATEMENT OF THE BASIS OF THIS COURT'S JURISDICTION

The Florida First District Court of Appeal held that § 440.15(1)(f)1, Fla. Stat., formerly § 440.15(1)(e), Fla. Stat., was constitutionally valid against the argument that this statute violated the Supremacy Clause of the U.S. Constitution and the equal protection guarantees of the federal and state constitutions. The Supreme Court of Florida declined to accept jurisdiction to review on July 16, 2003.

In 1965, the Congress authorized the states, as a state option, to reduce workers' compensation on account of the receipt of social security disability benefits. In 1981, Congress withdrew this authorization, but grandfathered the approximately one third of the states (like Florida) that had exercised the state option by enacting such legislation; thereby making it totally illegal in two thirds of the states for the state legislature to enact such legislation. The states

that had exercised the state option were allowed to keep what they had already enacted, but were not authorized to change such laws, both by the terms of the Congressional amendment and the subsequent regulation of the Social Security Administration contained in the Code of Federal Regulations. Nine years later, in 1990, Florida adopted what is now § 440.15(1)(f)1, Fla. Stat., which provides that those employees who are receiving workers' compensation permanent total disability, who received social security total disability, and who would be eligible to receive social security old age retirement after age 62, are no longer entitled to the workers' compensation cost of living adjustment.

The Supreme Court of the United States held in *Rose v. Arkansas State Police*, 479 U.S. 1, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986), that the states could not reduce workers' compensation on account of the receipt of benefits under federal law without specific authorization from Congress to do so.

The Code of Federal Regulations specifically provides that the federal government will not recognize any state law change in the reduction of workers' compensation on account of the receipt of social security disability after February 18, 1981. 20 C.F.R. § 404.408(b).

The Supremacy Clause of the federal constitution provides that the laws of the United States are the supreme law of the land. This also includes the rules and regulations of federal agencies. The Florida statute was passed nine years after Congress withdrew authorization to the states to enact such legislation. Therefore, it violates the Supremacy Clause.

The United States Constitution guarantees equal protection of the laws. Using the rational basis test, it is totally unreasonable to take away a cost of living adjustment from those persons who are injured at work resulting in permanent total disability (blindness, paralysis, amputation, etc.) so that they would revert to their original workers' compensation rate from years before, when they reach age 62, just because they are eligible for a social security early (reduced), old age retirement.

The Supreme Courts of Colorado, Arkansas and West Virginia have already held that laws, which reduce workers' compensation payments to those who are permanently totally disabled on account of the receipt of social security old age retirement benefits, violate the equal protection, guarantees of the federal constitution. However, the Florida First District Court of Appeal held that such laws do not violate equal protection guarantees. There is a wide divergence in the courts of last resort of the various states on this point, including Kentucky and Washington, which hold the same as Florida.

For these reasons, it would be most appropriate for the Supreme Court of the United States to consider the issues involved pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

Art. VI, cl. 2, U.S. Const.; Amend. XIV, § 1, U.S. Const.; 42 U.S.C. § 424a(d); 20 C.F.R. § 404.408(b); § 440.15(1)(e), Fla. Stat. (1991).

CONCISE STATEMENT OF THE CASE

The petitioner, Arthur Myers, was the appellant below before the Florida First District Court of Appeal. The respondents were his employer, the City of North Miami, Florida, and its workers' compensation insurance carrier, Integrated Insurance Company.

Myers claimed the continuation of the workers' compensation cost of living adjustment (COLA) for permanent total disability, which he had been receiving. The employer/carrier had discontinued this benefit after age 65. The Judge of Compensation Claims denied this claim based on § 440.15(1)(e), Fla. Stat. (1991).

Myers appealed, challenging the constitutional validity of the statute. (The Judge of Compensation Claims did not have jurisdiction on this issue.)

In an opinion of January 8, 2003, the Florida First District Court of Appeal expressly declared that the statute was constitutionally valid in that it did not violate the Supremacy Clause of the U.S. Constitution or the equal protection guarantees of the state and federal constitutions.

Myers sought review in the Supreme Court of Florida, which declined to accept jurisdiction, 5 to 2, by order dated July 16, 2003.

CONCISE STATEMENT OF THE FACTS

Myers was injured in his employment on March 22, 1991, and January 21, 1992, and rendered permanently and totally disabled from all work. He received social security total disability. He received workers' compensation permanent total disability based on the compensation rate in force on his last date of accident. In addition, he received a cost of living adjustment amounting to 5% of his own compensation rate for each year since his accident, but not exceeding the maximum rate for the year of payment. § 440.15(1)(f), Fla. Stat. Although called a "supplemental benefit" in the statute, it is a cost of living adjustment (COLA). *City of Clearwater v. Acker,* 755 So. 2d 597 (Fla. 1999).

When Myers reached age 65, his COLA was discontinued, although his social security old age benefit, after age 65, was the same amount as his social security disability benefit had been.

The employer/carrier relied on a Florida statute, which provides:

> Entitlement to these supplemental payments shall cease at age 62 if the employee is eligible for social security benefits under 42 U.S.C. ss. 402 and 423, whether or not the employee has applied for such benefits.

§ 440.15(1)(f)1, Fla. Stat.; formerly § 440.15(1)(e), Fla. Stat. (1991).

This statute was first enacted in 1990. Ch. 90-201, § 20, Laws of Fla.

In *Wilkins v. Broward County School Bd.*, 754 So. 2d 50 (Fla. 1st DCA 2000), the Florida First District Court of Appeal held that this statute applied to anyone who received social security total disability and workers' compensation permanent total disability, who was eligible for social security old age retirement after age 62.

ARGUMENT

Question One

In 1965, Congress created the social security offset by which social security disability benefits were reduced on account of the receipt of workers' compensation, according to a formula, until age 62. 42 U.S.C. § 424a(a). At the same time, Congress created an exception, by authorizing the states to reverse the offset, as an option, to reduce workers' compensation on account of the receipt of social security disability. 2 U.S.C. § 424a(d).

Florida enacted such a law in 1974, providing for workers' compensation to be reduced on account of the receipt of social security disability, according to a formula, until age 62, but never more than what the federal government would have deducted. § 440.15(1)(f), Fla. Stat.; formerly § 440.15(1)(e), Fla. Stat. (1991).

In the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 9735, Sec. 2208(6) (1981), Congress amended

42 U.S.C. § 424a in two ways: (1) to increase from 62 to 65 the years during which the Social Security Administration could reduce social security disability on account of the receipt of workers' compensation; and (2) to withdraw the authorization to the states to reduce workers' compensation on account of the receipt of social security disability. However, Congress grandfathered the states that had already enacted such laws, but only as to state laws enacted prior to February 18, 1981. The federal statute as amended in 1981, provides:

> The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title, **and such law or plan so provided on February 18, 1981**. (Emphasis added.)

42 U.S.C. § 424a(d) (1981).

At that point, only about one third of the states had already enacted laws reducing workers' compensation benefits on account of the receipt of social security. Thus, in two thirds of the states, such laws are now completely forbidden. In the remaining one third (like Florida), the states may keep such laws as they had on February 18, 1981, but they may not change them. Vol. 9, *Larson's Workers' Compensation Law*, § 157.03(5)(a), p. 157-18 (2000).

Following the 1981 Congressional Amendment, the Social Security A ministration enacted 20 C.F.R. § 404.408(b), providing that the state law involved actually had to have been in effect on February 18, 1981, and that

the federal government would not recognize any change thereafter.

In the present case, § 440.15(1)(f)1, Fla. Stat., cutting off the cost of living adjustment at age 62 on account of the receipt of social security benefits was passed in 1990, nine years later. Ch. 90-201, § 20, Laws of Fla.

Acts of state legislatures which conflict with or interfere with the laws of the United States, violate Article VI, cl. 2, of the U.S. Constitution, commonly called "the Supremacy Clause". *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824).

The words, "the Laws of the United States" in the Supremacy Clause include the rules and regulations of federal agencies, not just the acts of Congress. *Free v. Bland*, 369 U.S. 663, 8 L. Ed. 2d 180, 82 S. Ct. 1089 (1962); *Texas Employers' Ins. Assoc. v. U. S.*, 569 F. 2d 874 (5th Cir. [Texas] 1978), *cert. denied*, 439 U.S. 826, 58 L. Ed. 2d 119, 99 S. Ct. 98 (1978).

In *Rose v. Arkansas State Police*, 479 U.S. 1, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986), the Supreme Court of the United States held that a provision in the Arkansas workers' compensation law, which reduced workers' compensation on account of the receipt of a benefit under federal law, violated the Supremacy Clause. The Arkansas Court had decided that the states had power to reduce workers' compensation on account of the receipt of federal benefits and did not need the permission of Congress to do so. However, the Supreme Court of the United States disagreed.

Question Two

On the equal protection question, using the rational basis test, the Supreme Courts of Arkansas, *Golden v. Westark Community College*, 969 S.W. 2d 154 (Ark. 1998); Colorado, *Indus. Claim Appeals Office v. Romero*, 912 P. 2d 62 (Colo. 1996); and West Virginia, *State ex rel. Boan v. Richardson*, 482 S.E. 2d 162 (W. Va. 1996), have specifically held that provisions in their state workers' compensation laws which reduced the payment of workers' compensation for permanent total disability on account of the receipt of social security old age retirement were invalid, as violating the equal protection of the laws' guarantees in their state constitutions, as well as the United States Constitution. Other state courts have viewed the issue differently. *E.g.*, *Harris v. State of Washington, Dept. of Labor*, 842 P. 2d 1056 (Wash. 1993); *McDowell v. Jackson Energy RECC*, 84 S.W. 3rd 71 (Ky. 2002).

CONCLUSION

For these reasons, the petitioner submits that the Supreme Court of the United States should review the decision of the Florida First District Court of Appeal because it held a state statute to be valid when the Supreme Court of the United States has already rendered a contrary decision on the supremacy issue, and the Social Security Act and the Code of Federal Regulations contain specific contrary provisions dealing with the supremacy issue; and the courts of last resort in several of the states

are in severe and vast disagreement as to the correct rule of law on the equal protection issue.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

WINTON HARRELL,

Appellant,

v. CASE NO. 1D01-3512

FLORIDA CONSTRUCTION SPECIALISTS/AARLA/AGENT FOR FWCIGA,

Appellee.

and

ARTHUR MYERS,

Appellant,

v. CASE NO. 1D02-368

CITY OF NORTH MIAMI and INTEGRATED INS. CO.,

Appellees.

_____/

Opinion filed January 8, 2003.

Case No. 01-3512:

An appeal from an order of the Judge of Compensation Claims. John J. Lazzara, Judge.

Arthur C. Beal, Jr., of Arthur C. Beal, Jr., Tallahassee; and Richard A. Sicking of Richard A. Sicking, P.A., Coral Gables, for Appellant.

Mary L. Wakeman of McConnaughhay, Duffy, Coonrod, Pope & Weaver, P.A., Tallahassee, for Appellee.

Case No. 02-368:

An appeal from an order of the Judge of Compensation Claims. Kathryn S. Pecko, Judge.

Richard A. Sicking of Richard A. Sicking, P.A., Coral Gables, for Appellant.

William C. Robinson, Miami, for Appellees.

DAVIS, J.

Appellants/claimants, Arthur Myers and Winton Harrell, appeal orders of the judges of compensation claims holding that because appellants were injured and reached permanent total disability (PTD) prior to age sixty-two, they were not entitled to supplemental benefits after age sixty-five. In this consolidated appeal, appellants also challenge the constitutionality of section 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995), the authority for the termination of appellants' supplemental benefits, on supremacy clause and equal protection grounds. We affirm for the reasons set forth in this opinion.

Appellants both suffered industrial accidents rendering them permanently and totally disabled before the age of sixty-two. Both appellants collected disability payments and both insurance carriers terminated the payments of supplemental benefits for PTD on the basis of section 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1.,

Florida Statutes (1995), respectively.[1] Appellants sought payment of the supplemental benefits for PTD after they reached the age of sixty-five, and the respective judges of compensation claims denied appellants' claims pursuant to this court's opinion in *Wilkins v. Broward County School Board,* 754 So. 2d 50, 52 (Fla. 1st DCA 2000), *rev. den.,* 766 So. 2d 224 (Fla. 2000) (holding that "where a claimant is injured and reaches PTD prior to age 62, the claimant is not entitled to supplemental benefits after age 65."). Appellants initially sought reversal of the JCC's denial of benefits on the grounds that *Wilkins* was not controlling because there was a horizontal conflict between sections 440.15(1)(e)1. and 440.15(10), or that there was a vertical conflict between section 440.15(1)(e)1. and 42 U.S.C. section 424a. Appellants' counsel, however, properly conceded at oral argument that should this court reject the constitutional challenges to the statutes at issue, *Wilkins* does control and *stare decisis* requires this court to affirm the orders.

Appellants contend that section 440.15(1)(e)1., Florida Statutes (1991) and section 440.15(1)(f)1., Florida Statutes (1995), as construed by this court, are in violation of the supremacy clause of the United States Constitution and/or their equal protection rights. The JCCs properly found that they lacked jurisdiction to determine whether the statutes are unconstitutional. *Hensley v. Punta Gorda,* 686

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[1] The language at issue, identical in both versions of the statute, is as follows: "Entitlement to these supplemental payments shall cease at age 62 if the employee is eligible for social security benefits under 42 U.S.C. ss. 402 and 423, whether or not the employee has applied for such benefits." § 440.15(1)(e)1., Fla. Stat. (1991), and § 440.15(1)(f)1., Fla. Stat. (1995).

So. 2d 724, 725 (Fla. 1st DCA 1997) ("As an administrative officer vested with only certain limited quasi-judicial powers, a judge of compensation claims does not have jurisdiction to declare a portion of the Florida Workers' Compensation Act unconstitutional or violative of a federal statute.") (citing *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 207-208 (Fla. 1st DCA 1983), *approved* 452 So.2d 932 (Fla.1984)); *Bradley v. Hurricane Rest.*, 670 So. 2d 162, 164 (Fla. 1st DCA 1996). Appellants' constitutional challenges to the statutes are, therefore, properly before this court. *Sasso,* 431 So. 2d at 208.

Appellants first contend that the termination of benefits under sections 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995) is precluded by the Supremacy Clause of the United States Constitution because the statutes are preempted by federal law, specifically, 42 U.S.C. section 424a(d). The Supremacy Clause, found in article VI, clause 2 of the United States Constitution, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. "Consequently, Congress has the constitutional power to preempt state law." *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 361 (11th Cir. 1994) (citing *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 368 (1986)).

Prior to 1981, the Social Security Act contained a provision for the coordination of workers' compensation disability benefits with social security disability benefits by providing that the combination of the two benefits could not exceed 80% of a claimant's average current earnings. If the benefits exceeded the 80% cap, the social security benefits would be offset to the 80% level. 42 U.S.C. § 424a(a) (1976). This coordination of benefits, however, contained an exception which allowed the states to choose their own method of coordinating both workers' compensation and social security benefits. That coordination of benefits has become known as a "reverse offset," and it enables states to reduce the amount of workers' compensation payments by making social security benefits payable before the workers' compensation benefits. Florida was among the states which exercised the option to reverse the federal offset by enacting section 440.15(10), Florida Statutes (1980). Under section 440.15(10), the combination of workers' compensation benefits and social security benefits could not exceed 80% of an employee's average weekly wage. The social security benefit is paid first, and the "offset," if any, inures to the benefit of the employer/carrier at the 80% level. The offset ceases at age sixty-two.

In 1981, Congress amended 42 U.S.C. section 424a, as found in the Omnibus Budget Reconciliation Act of 1981. Congress changed the age during which the reduction of social security benefits could be made on account of the receipt of workers' compensation benefits from age sixty-two to age sixty-five. Congress also added the following language to 42 U.S.C. section 424a:

(d) Exception

> The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

Through this amendment, Congress abolished the reverse offset for those states that had not already enacted laws for such an offset. The states, including Florida, that had already enacted reverse offset provisions were "grandfathered" in and allowed to continue to apply reverse offsets, i.e., reduce workers' compensation benefits on account of the receipt of social security benefits.

Appellants challenge the validity of section 440.15(1)(e)1. which was first enacted in 1990 and provides for the cessation of the supplemental benefits for PTD upon an employee's sixty-second birthday. Appellants argue that the statute operates as a reverse offset under section 440.15(10) because it reduces the workers' compensation benefits on account of the receipt of social security benefits, and that Florida cannot reduce such benefits unless the offset was a law in 1981. We hold that the termination of supplemental benefits pursuant to 440.15(1)(e)1., Florida Statutes (1991) and section 440.15(1)(f)1., Florida Statutes (1995) is not a reverse offset pursuant to section 440.15(10), and therefore, is not in conflict with 42 U.S.C. 424. Based on the analysis that

follows, we find that the statutory provisions are also not preempted by 42 U.S.C. section 424a(d).

Congress's constitutional power to preempt state law is not unlimited. "A federal statute does not supersede state law unless that is the clear and whole purpose of Congress." *Lot 5,* 23 F.3d at 361 (citing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992)). In *Cipollone,* the United States Supreme Court recognized that consideration of issues arising under the Supremacy Clause begins with the "assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). "Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.* (citations and internal quotations omitted).

The intent of Congress may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (citation and internal quotations omitted). Further, in the absence of an express command by Congress, state law will be pre-empted if the law "actually conflicts with federal law (citation omitted) or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (citations and internal quotations omitted).

In *State v. Stepansky,* 761 So. 2d 1027 (Fla. 2000), the Florida Supreme Court noted several ways in which federal law can preempt state law. First, if the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; second, if the federal legislation touches a

field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; or third, the "object sought" by the federal legislation may reveal the same purpose. *Id.* at 1033-1034 (citations omitted). The exception created by Congress in 42 U.S.C. 424a(d) is not so pervasive as to require this court to infer that Congress intended to preclude the State of Florida from ever terminating benefits such as those terminated by 440.15(1)(e)1., Florida Statutes (1991) and section 440.15(1)(f)1., Florida Statutes (1995), and not offset by section 440.15(10). To the contrary, it seems clear that the purpose of 42 U.S.C. section 424a(d) was to avoid a double offset by allowing the states to shift costs to the federal government through a reverse offset program. *Harris v. State of Washington,* 843 P.2d 1056, 1060 (Wa. 1993) (citing *Sciarotta v. Bowen,* 837 F.2d 135, 140 (3d Cir. 1988) (quoting *Swain v. Schweiker,* 676 F.2d 543 (11th Cir.), *cert. denied,* 459 U.S. 991 (1982)).

In *Harris,* the Supreme Court of Washington rejected a similar challenge after a thorough analysis of the issue. The argument advanced in *Harris* is similar to the one made before this court, i.e., that 42 U.S.C. section 424a(d) is evidence of congressional intent to preempt state reverse offsets of federal benefits. As found in *Harris,* 42 U.S.C. section 424a not only fails to express an intent to occupy the field of coordinating benefits, it "provides for some types of state reverse offsets, thus indicating a Congressional interest in *sharing* the field of benefit coordination." *Id.* at 1061 (emphasis supplied).

We find no inconsistency between the Florida statutes and the purposes and objectives of the federal law, 42 U.S.C. section 424a, which explicitly coordinates benefits

to avoid duplication. The Florida statutes, by avoiding duplicative benefits, are consistent with federal law. We hold that 42 U.S.C. section 424a does not preempt sections 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995).

Appellants alternatively argue that the cessation of the cost of living supplements for PTD, under sections 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995), violates the constitutional guarantees of equal protection of the law. The equal protection clauses of the state and federal constitutions guarantee that all citizens similarly situated be treated alike. Art. I, § 2, Fla. Const.; U.S. Const. amend. XIV, § 1. Because appellants' challenge is based on age discrimination, it is subject to the rational basis review.[2]

We find that the termination of PTD supplemental benefits at the age of sixty-two, pursuant to sections 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995), survives the rational basis test because it is reasonably related to a permissible government objective. In *Wilkins,* this court noted that the legislature "could have legitimately assumed that in these

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[2] Initially, we note that age is not a suspect class. *State v. T.M.,* 761 So. 2d 1140, 1145-1146 (Fla. 2nd DCA 2000) (citing *Gregory v. Ashcroft,* 501 U.S. 452, 470 (1991)); *State v. Walborn,* 729 So. 2d 504, 505 (Fla. 2nd DCA 1999); *Sasso v. Ram Property Management,* 431 So. 2d 204 (Fla. 1st DCA 1983) (noting that "age has not as yet, for federal equal protection purposes, been determined either a suspect or quasi/suspect class."). "Age limitations and restrictions may survive a constitutional challenge and be enforced if they pass the 'rational basis' test, i.e., the age classifications are reasonably related to a permissible governmental objective." *Wright v. State,* 739 So. 2d 1230, 1232 (Fla. 1st DCA 1999).

cases [where a claimant is injured and reaches PTD prior to age 62] a claimant would not continue to work after a traditional retirement age." 754 So. 2d at 52. Further, the *Final Staff Analysis and Economic Impact Statement* for the original enactment of the statutory language at issue in section 440.15(1)(e)1. states that the objective of the statute was to lower the premium costs for workers' compensation coverage. Fla. H.R. Comm. on Commerce, CS/HB 3809 and CS/HBs 2671, 1099, 1499, 1611, 2265, 2871, 2957, 3007, and 3135 (1990) Staff Analysis (final July 18, 1990) ("The bill revises the Workers' Compensation law in order to address the rising costs of worker's compensation insurance in the state. Though some reduction in benefit levels was necessary to bring about the desired reduction in costs, benefit levels were cut only as a last resort."). The goal of reducing the costs of premiums is not, "under the rational basis test, an illegitimate or irrelevant consideration." *Sasso,* 431 So. 2d at 220. Appellants have failed to meet their burden in establishing that there is no legitimate state purpose furthered by the termination of PTD supplemental benefits provision. We hold that the legislature's statutory objective satisfies the rational basis test and that sections 440.15(1)(e)1., Florida Statutes (1991) and 440.15(1)(f)1., Florida Statutes (1995) do not violate equal protection.

Accordingly, we find that *Wilkins* controls because both claimants herein were injured and reached PTD prior to age sixty-two, and they are, therefore, not entitled to supplemental benefits after age sixty-five; we further find the constitutional challenges lacking in merit; and we affirm the orders on appeal.

BENTON and POLSTON, JJ., CONCUR.

Supreme Court of Florida

WEDNESDAY, JULY 16, 2003

CASE NO.: SC03-198
Lower Tribunal Nos.:
1D02-368, 1DO1-3512

WINTON HARRELL, ET AL.	vs.	FLORIDA CONSTRUCTION SPECIALISTS, ET AL.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

WELLS, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur ANSTEAD, C.J., and LEWIS J., dissent.

Petitioners' Motion for Attorney's Fees is hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur

LEWIS, J., dissents.

A True Copy
Test:
/s/ Thomas D. Hall
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bh
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RICHARD A. SICKING
WILLIAM C. ROBINSON
MARY LALLEY WAKEMAN
HON. KATHRYN S. PECKO, JUDGE
HON. JOHN J. LAZZARA, JUDGE

20 C.F.R. § 404.408(b) provides:

> (2) The reduction of a benefit otherwise required by paragraph (a)(2) of this section is not to be made if:
>
> (i) The law or plan under which the periodic public disability benefit is payable provides for the reduction of that benefit when anyone is entitled to a benefit under title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under section 223 of the Act and that law or plan so provided on February 18, 1981. (The reduction required by paragraph (a)(2) of this section will not be affected by public disability reduction provisions not actually in effect on this date or by changes made after February 18, 1981, to provisions that were in effect on this date providing for the reduction of benefits previously not subject to a reduction);

Supreme Court, U.S.
FILED
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No. 03-555

In The

Supreme Court of the United States

ARTHUR MYERS,

Petitioner,

v.

CITY OF NORTH MIAMI AND INTEGRATED ADMINISTRATORS INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

RESPONDENTS' RESPONSE FOR PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One: Whether the Florida court of appeals correctly concluded that the state workers compensation statute allowing termination of supplemental benefits pursuant to 440.15(1)e(1) Florida Statutes (1991), and section 440.15(1)(f)1 Florida Statutes (1995) was not a "reverse offset", and therefore neither in conflict with, nor preempted by 42 U.S.C. 424 which governs entitlement to social security benefits?

Question Two: Whether the Florida court of appeals correctly decided that the above-mentioned state statutes which terminate supplemental benefits to certain injured workers were not violative of the equal protection clause of the United States Constitution, because the Florida legislature had a legitimate state interest to reduce workers compensation premium costs to business.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Integrated Administrators, is a subsidiary of Blue Cross Blue Shield of Florida.

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OPINIONS BELOW

The opinion of Judge of Compensation Claims Kathryn S. Pecko, dated January 16, 2002, in the case of *Myers v. City of North Miami*, OJCC Nos. 91-000397MIA, 92-001239MIA is unpublished. Her decision was appealed to the Florida First District Court of Appeal, and consolidated with *Harrell v. Florida Construction, et al.*, 834 So.2d 352 (Fla. 1st DCA 2003). The Florida Supreme Court declined to accept jurisdiction of the case July 16, 2003, and it is reported at *Harrell et. al. v. Florida Construction Specialist,* 851 So.2d 728 (Fla. 1st DCA 2003)

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1257(a).

STATEMENT

The opinion of the Florida First District Court of Appeal is the best statement of the facts, and are fairly restated by the petitioner in his brief. Respondent naturally adopts, and incorporates that opinion for purposes of this response.

ARGUMENT

No judicial interpretation of federal, and state statutes correlating the receipt of social security benefits, and workers compensation benefits has accepted the petitioner's claim that it is illegal for state legislatures to

amend their workers compensation laws after the passage of the Omnibus Reconciliation Act of 1981, due to violation of the Supremacy Clause of the United States Constitution, and the preemption of federal social security law. In 1990 the state of Florida was faced with a crisis in workers compensation due to high premium costs for employers. The legislature was charged, by the then Governor Lawton Chiles with reducing premium costs for businesses by amending the benefit structure to injured workers. Towards this end, the sweeping changes in the workers compensation statute included the limitation on payment of supplemental benefits authorized as cost of living increases for injured workers receiving permanent total disability workers compensation benefits, and eligible for social security. The legislature of Florida was justified, due to the insurance crisis in the state, in creating this cost saving measure for business, and amending the state statute did not violate the Supremacy Clause, or Equal Protection Clause of the United States Constitution.

There is no supremacy clause violation in 440.15(1)e(1) Florida Statute 1991 because there is no express intent by Congress in 42 U.S.C. Sec. 424a(d) to usurp state authority over supplemental benefits. 440.15(1)e(1) Florida Statute does not create an offset, reverse or otherwise, which could be interpreted as constitutionally repugnant. Petitioner's reliance on *Rose v. Arkansas State Police*, 479 U.S. 1, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986) is misplaced. In that case there was no issue of congressional intent as legislative histories clearly illustrated Congress' intent to protect widows of police killed in the line of duty. In the instant case no similar intent is expressed in the Omnibus Budget Reconciliation Act of 1981 to assist this court in concluding Congress'

amendment to 42 U.S.C. Sec. 424a would tolerate no state action in the coordination of social security and workers compensation benefits. Thus far no legislative history or other evidence has been presented to support the position of the petitioner that any state action correlating workers compensation benefits with social security is illegal. After lengthy preemption analysis, petitioner's argument, relying on the violation of the Supremacy Clause was correctly rejected by the Florida First District Court of Appeal.

Petitioner's equal protection argument, that state laws which terminate workers compensation benefits upon receipt of social security benefits is wrong, has been raised in many states, and been largely rejected. They have been upheld in most states as constitutional. Although some state supreme courts have decided this issue differently from the decision below, it appears the better view, and probably most prominent, concludes no constitutional challenge exists. As stated by the Supreme Court of Massachusetts in *Tobin's Case,* 424 Mass. 250, 253, 675 N.E.2d 781 (1997):

> For these reasons, there is universal agreement that statutes like *G. L. c. 152, § 35E,* promote legitimate governmental goals and do not violate rights of equal protection. See *Richardson v. Belcher, 404 U.S. 78, 82-84, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971); Rosa v. Warner Elec. Contr., 849 P.2d 845, 848 (Colo. Ct. App. 1992),* aff'd, *870 P.2d 1210* (Colo.), cert. denied, *513 U.S. 814, 130 L. Ed. 2d 25, 115 S. Ct. 69 (1994); Acosta v. Kraco, Inc., 471 So. 2d 24, 25* (Fla.), cert. denied, *474 U.S. 1022, 88 L. Ed. 2d 559, 106 S. Ct. 576 (1985); Brown v. Goodyear Tire & Rubber Co., 3 Kan. App. 2d 648, 653, 599 P.2d 1031 (1979),*

> aff'd, *227 Kan. 645, 608 P.2d 1356,* appeal dismissed, *449 U.S. 914, 66 L. Ed. 2d 142, 101 S. Ct. 310 (1980); Berry v. H.R. Beal & Sons, 649 A.2d 1101, 1103 (Me. 1994); Peck v. General Motors Corp., 164 Mich. App. 580, 599, 417 N.W.2d 547 (1987),* vacated on other grounds sub nom. *Pankow v. General Motors Corp., 432 Mich. 892 (1989); McClanathan v. Smith, 186 Mont. 56, 66, 606 P.2d 507 (1980); Harris v. Department of Labor & Indus., 120 Wash. 2d 461, 478-481, 843 P.2d 1056 (1993).*

Add to this chorus recently decided *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (S. Ct. Kentucky 2002), *Injured Workers of Kansas v. Franklin*, 942 P.2d 591 (S. Ct. Kansas 1997), *Vogel v. Wells Fargo*, 937 S.W.2d 856 (S. Ct. Tenn. 1996), *Culver v. Ace Electric*, 971 P.2d 641 (S. Ct. Colo. 1999), and it becomes clear the equal protection argument has been constantly rejected.

The state statute enacted by the Legislature in 1990 is not violative of the equal protection clause of the United States Constitution because there is a rational basis for cessation of the supplemental benefit, particularly in light of the workers compensation crisis, which existed in this state at the time of its enactment. The legislative preamble of the workers compensation law as amended in 1990 consistently refers to cost savings as a basis for amending the statewide compensation benefits scheme. Clearly equal protection is not violated when the legislature predicates its statutory changes to the delivery mechanisms of workers compensation benefits upon cost savings, and the need to encourage business development in the state at a time when workers compensation coverage would have been cost prohibitive without legislative action. Case law is clear that in cases involving the area of economics and

social welfare, state classifications must bear some rational basis to the legislative goal to be achieved in order to be consistent with equal protection principles. That is to say there must be a rational basis for classifications created by the legislature to achieve objective goals for the state. *Sasso v. RAM Property Management*, 317 So.2d 204 (Fla. 1st DCA 1983).

Industry looks to the courts to interpret the laws so as to maintain the stable business climate, and not to disturb the existing precedent which has been relied upon for more than 10 years. This industry in Florida cannot take another shock wave overturning established laws already rightly decided by the courts. The first district court of appeals has considered this statute on several occasions. In *Wilkins v. Broward County School Board,* 754 So.2d 50 (Fla. 1st DCA 2000) the court noted three cases in 1999 alone considered this statute. See *Orlando Regional Health-Care System v. Owens,* 731 So.2d 1278 (Fla.1st DCA 1999); *Dixon v. Pasadena Yacht and Country Club*, 731 So.2d 141 (Fla. 1st DCA 1999); *Scott v. Mohawk Canoe*, 730 So.2d 731 (Fla. 1st DCA 1999); *Burger King Corp. v. Moreno,* 689 So.2d 288 (Fla. 1st DCA 1997). While there is disagreement as to whether or not the specific constitutional arguments raised by Petitioner were raised in the above-mentioned cases, it is submitted the statute has been adequately reviewed, and its constitutionality rightly decided by the Florida First District Court of Appeal.

The constitutionality of this state statute is not legitimately in issue, and the interpretation of the law requires adherence to *stare decisis*. Jurisdiction does not

lie upon the arguments presented, and this court's discretion should not be exercised.

CONCLUSION

This court should decline to exercise its discretionary jurisdiction because the district court of appeal properly concluded the state statute constitutional.

Respectfully submitted,

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